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COMMERCIAL LAW—And Then Personal Property Became Real Property: *In re Anthony*

I. INTRODUCTION

This Note examines *Reardon v. Alsup (In re Anthony)*¹ and discusses its implications. In New Mexico, a security interest in personalty is governed by Article 9 of the New Mexico Uniform Commercial Code (also referred to as “the Code”).² It has been well-accepted in New Mexico that a vendor’s interest in a real estate contract is personalty.³ *In re Anthony* brought a controversial commercial and real property law issue before the New Mexico Supreme Court: whether a security assignment of a vendor’s interest in a real estate contract, which is considered personalty in New Mexico for many purposes, is excluded from Article 9 of the Code as a “transfer of an interest in or lien on real estate.”⁴ The *Anthony* court held that an assignment of a vendor’s interest in a real estate contract as security does not fall within the scope of Article 9 and, thus, does not require filing of a financing statement to perfect the security interest⁵ against the claims of third parties.

II. STATEMENT OF THE CASE

On October 24, 1985, Charles Anthony and Annita Anthony-Robbins entered into an executory real estate contract for the sale of real property to Jane and Amelia Sanchez.⁶ Accordingly, the Anthonys retained legal title to the real property until they received full payment from the vendees.⁷

In a later transaction, the Anthonys borrowed over \$10,000 from James and Linda Alsup and executed a “real estate mortgage note.”⁸ As security for the note, the Anthonys assigned their vendors’ interest in the Anthony-Sanchez real estate contract to the Alsups. The assignment, which included the right to receive monthly payments from the vendees, was documented

1. 114 N.M. 95, 835 P.2d 811 (1992).

2. N.M. STAT. ANN. §§ 55-9-101 to -507; see N.M. STAT. ANN. § 55-9-101 (Repl. Pamp. 1987) (Official Cmt.). The New Mexico Uniform Commercial Code was substantially adopted from the Uniform Commercial Code as promulgated by the American Law Institute and the National Conference of Commissioners on Uniform State Laws in the 1958 Official Text. The most recent version of the Uniform Commercial Code is the 1992 Official Text with Comments. If there are differences in the New Mexico version and the most recent Uniform Commercial Code version that affect the discussion of this Note, those differences will be noted.

3. *In re Anthony*, 114 N.M. at 96, 835 P.2d at 812; see *Marks v. City of Tucumcari*, 93 N.M. 4, 595 P.2d 1199 (1979).

4. See N.M. STAT. ANN. § 55-9-104(j) (Repl. Pamp. 1987 & Cum. Supp. 1992).

5. A security interest is defined as “an interest in personal property or fixture which secures payment or performance of an obligation.” N.M. STAT. ANN. § 55-1-201(37) (1987).

6. *In re Anthony*, 114 N.M. at 96, 835 P.2d at 812.

7. *Id.*

8. *Reardon v. Alsup (In re Anthony)*, Ch. 7 Case No. 7-89-00194MA, Adv. No. 89-0066M, slip op. at 2 (Bankr. D. N.M. Aug. 31, 1989) (on file with Author).

in a "Collateral Assignment of Owner's Interest in Real Estate Contract" ("Assignment").⁹ The Assignment included all of the Anthonys' "right, title, equity, and interest" in the real estate contract.¹⁰ Additionally, the Assignment clearly stated that it was security for the performance of the terms and conditions of the Real Estate Mortgage Note.¹¹ The Alsups did not file a financing statement under Article 9 of the Code.¹² They did, however, record the transaction in Bernalillo County in accordance with the real property laws of New Mexico.¹³

On January 26, 1989, the Anthonys filed for bankruptcy. The trustee filed an action in bankruptcy court as a hypothetical lien creditor pursuant to section 542 (regarding turnover of property of the estate) and section 547 (regarding recovery of preferences) of the United States Bankruptcy Code ("Bankruptcy Code").¹⁴ The trustee's claim was based on the theory that the Alsups had not perfected their security interest under Article 9 and, therefore, it was avoidable by the trustee.¹⁵

The bankruptcy court avoided the Alsups' interest in the Assignment. The United States District Court for the District of New Mexico affirmed the bankruptcy court's judgment, holding that because the Alsups failed to file a financing statement under Article 9, their security interest was not perfected.¹⁶ Thus, under section 9-301(1)(b) of the Code and section 544(a)(1) of the Bankruptcy Code, the Alsups' interest was subordinate to that of the trustee.¹⁷ On appeal, the Tenth Circuit Court of Appeals certified the issue to the New Mexico Supreme Court on November 1, 1990.¹⁸ The New Mexico Supreme Court issued its decision on June 15, 1992.¹⁹

III. GENERAL BACKGROUND

The Uniform Commercial Code ("Code") became effective in New Mexico on January 1, 1962.²⁰ The purpose of Article 9 of the Code, entitled "Secured Transactions," is to regulate "security interests in

9. *Id.*

10. *Id.*

11. Slip Opinion at 2, *In re Anthony*, (No. 7-89-00194MA).

12. *In re Anthony*, 114 N.M. at 96, 835 P.2d at 812.

13. *Id.*

14. See 11 U.S.C. §§ 542, 547 (1988).

15. *Id.*

16. *Id.*

17. Slip Opinion at 4-5, *In re Anthony*, (No. 7-89-00194MA).

18. The issue was certified pursuant to New Mexico statutory provisions and New Mexico Rules of Appellate Procedure, which provide in pertinent parts that a United States circuit court of appeals may certify a question of state law to the New Mexico Supreme Court. N.M. STAT. ANN. § 34-2-8 (Repl. Pamp. 1990); N.M. R. APP. P. 12-607. The questions presented must involve propositions of New Mexico law and the lack of binding New Mexico precedents that are determinative of the pending case. N.M. R. APP. P. 12-607. The Tenth Circuit Court of Appeals certified the question of state law because it involved New Mexico commercial law, real property law, and public policy and legislative intent regarding the legislature's adoption of the Uniform Commercial Code. Certification Request, *Reardon v. Alsup (In re Anthony)*, No. 90-2146 (10th Cir. Nov. 1, 1990).

19. *In re Anthony*, 114 N.M. 95, 835 P.2d 811 (1992).

20. 1961 N.M. Laws, ch. 96 § 10-101.

personal property and fixtures.”²¹ With the exception of the exclusions listed in section 9-104 of the Code, Article 9 applies to “any transaction (regardless of its form) which is intended to create a security interest in personal property.”²² To determine whether Article 9 applies to a transaction, the primary test is whether the collateral that secured the debt was personal property.²³

The issue in *In re Anthony* focuses on section 9-104(j), which complicates section 9-103 by excluding from the Code a “transfer of an interest in or a lien on real estate.”²⁴ Problems regarding the scope of Article 9 arise practically and theoretically when the security interest is not clearly real or personal property, but a combination of the two. When the collateral is intangible personal property in the form of an obligation owing to the debtor, however, it does not matter that the “obligation [to pay the debt] is itself secured by a transaction or interest to which [Article 9] does not apply.”²⁵

A. Resolution of the Issue in Other Jurisdictions

In several jurisdictions encountering real-personal property security interests (such as the use of a mortgage and a note as collateral for a loan), there is a split in authority as to whether they are governed by Article 9.²⁶ Several jurisdictions have been confronted with the related issue of whether the subsequent assignment of a vendor’s interest in a real estate contract as collateral for a separate transaction is subject to the provisions of Article 9. Jurisdictions viewing such transactions as realty-related usually find that Article 9 is *not* applicable; likewise, jurisdictions viewing such transactions as personalty-related usually find that Article 9 *is* applicable.

1. Realty Jurisdictions—Article 9 Not Applicable

Jurisdictions that exclude real-personal transactions from Article 9 have employed a broad interpretation of the exclusions of section 9-104(j). Under a broad interpretation of section 9-104(j), it becomes irrelevant whether the transaction is characterized as realty or personalty.²⁷ By interpreting the exclusions broadly, any transaction that even remotely involves real property is excluded from the ambit of Article 9. These

21. N.M. STAT. ANN. § 55-9-101 (Repl. Pamp. 1987) (Official Cmt.).

22. *Id.* § 55-9-102(1).

23. *Id.* § 55-9-102 (Official Cmt.).

24. *Id.* § 55-9-104(j) (Repl. Pamp. 1987 & Cum. Supp. 1992); *see id.* § 55-9-102(3) (Repl. Pamp. 1987).

25. *Id.* § 55-9-102(3).

26. *See* John F. Wagner, Jr., Annotation, *Applicability of Article 9 of Uniform Commercial Code to Assignment of Rights Under Real-Estate Sales Contract, Lease Agreement, or Mortgage as Collateral for Separate Transaction*, 76 A.L.R. 4TH 765 (1990 & Supp. 1992); THOMAS M. QUINN, UNIFORM COMMERCIAL CODE COMMENTARY AND LAW DIGEST ¶ 9-102(B)(1) & ¶ 9-104(A)(18) (Cum. Supp. 1991).

27. *See In re Bristol Assoc., Inc.*, 505 F.2d 1056, 1060 (3d Cir. 1974).

realty jurisdictions claim that a narrow interpretation of the exclusions would nullify the intent of section 9-104(j).²⁸

Jurisdictions that find Article 9 inapplicable consider two main factors in their analysis.²⁹ The factors focus on the purpose of real property law and on the "perception of commercial reality" of the transaction.³⁰ One factor, the purpose of real property law, investigates the means used to complete the transaction.³¹ For example, if a party uses real property forms to complete the transaction, then some courts determine that the purpose of the law is to classify the transaction as a real property transaction.³²

The other factor, the "perception of commercial reality," is applied when parties have recorded their transaction under local real property laws.³³ In that case, courts reason that the "commercial reality" demonstrates that parties would most likely search the real property records when tracing the history of title to real property.³⁴ In these jurisdictions, the focus is on the result, which is notice of an interest by recording under real property laws, and it is determined that the spirit of notice has been satisfied when a party records under the real property laws.³⁵ These jurisdictions also tend to reward the creditor for recording the transaction, albeit under real property laws, in their attempt to provide notice.³⁶

Some jurisdictions acknowledge that a vendor's interest in a real estate contract is personalty but hold that it is also a realty interest within the meaning of section 9-104(j).³⁷ Although these jurisdictions acknowledge the personalty interest, they view an assignment of a real estate contract for collateral as "part and parcel" of the underlying real estate.³⁸ Under this analysis, an assignment of a vendor's rights is a transfer of a realty interest and should be recorded pursuant to the real property laws. Once a secured party has recorded the transaction in accordance with real property laws, some jurisdictions determine that notice has been provided to others seeking an interest in the property and that Article 9 does not apply at that point.³⁹

28. *Id.* at 1062 (citing PETER F. COOGAN ET AL., 1A SECURED TRANSACTIONS UNDER THE UNIFORM COMMERCIAL CODE § 16.04, at 1698 (1973)).

29. David A. Redle, *Article 9: Identifying Collateral as Real or Personal Property*, 23 UCC L.J. 185, 191 (1990).

30. *Id.* at 191.

31. *Id.*

32. *Id.*

33. *Id.* at 192.

34. *Id.* at 193.

35. *Id.*

36. *Id.*

37. *E.g.*, Swanson v. Union State Bank (*In re Hoepfner*), 49 B.R. 124, (Bankr. E.D. Wis. 1985) (a collateral assignment of vendor's interest in a land sales contract is not within the scope of Article 9).

38. *E.g.*, Security Bank v. Chiapuzio, 747 P.2d 335 (Or. 1987) (providing the bank's reasoning for not filing pursuant to the provisions of Article 9).

39. *E.g.*, *In re Hoepfner*, 49 B.R. 124 (Bankr. E.D. Wis. 1985).

A few jurisdictions find that the transactions are related to both realty and personalty⁴⁰ and that the realty aspect of the transaction is enough to exclude it from Article 9.⁴¹ The standard of review is whether the vendor retained legal title to the real property for the balance of the payments.⁴² If the vendor retained legal title, then it is determined that the collateral assignment is a transfer of a realty interest within the meaning of section 9-104(j).⁴³ Under this analysis, Article 9 is held to be inapplicable, and all that is needed to provide notice of the security interest is to record according to local real property laws.

2. Personalty Jurisdictions—Article 9 Applicable

Jurisdictions that include real-personal transactions under Article 9 have employed a narrow interpretation of the exclusions of section 9-104(j), giving the scope of Article 9 its fullest effect.⁴⁴ These jurisdictions consider several factors in their analysis.⁴⁵ One factor includes defining and characterizing the nature of the collateral. A second factor includes determining the intent of the parties. A third factor includes separating the collateral into its real and personal portions and weighing the two portions to identify the heavier interest. A fourth factor includes emphasizing the notice intent of the Code.⁴⁶ By employing these factors in their analysis, it has been suggested that “consistent and predictable” results are reached.⁴⁷

Some jurisdictions that classify a vendor’s rights in real estate contracts as personalty hold that subsequent transfers of those rights are transfers of personalty and are subject to Article 9.⁴⁸ These jurisdictions do not dispute that a creation or transfer of an interest in real property, such as a mortgage on real property as collateral for a loan, is not covered by Article 9. When “realty paper” is involved, however, Article 9 is applicable.⁴⁹ “Realty paper” results when a debtor mortgages real property to a creditor, and the creditor subsequently assigns the debtor’s promissory note and mortgage to another party as security for a loan.⁵⁰ The subsequent assignment creates realty paper.

40. Some jurisdictions accept an immediate solution to the problem, rather than analyzing the problem, by holding that parties need to comply with the notice requirements for both the real property laws and the Code. REDLE, *supra* note 29, at 194.

41. *E.g.*, *In re Hoepfner*, 49 B.R. 124 (Bankr. E.D. Wis. 1985).

42. *E.g.*, *Shuster v. Doane (In re Shuster)*, 784 F.2d 883 (8th Cir. 1986) (a collateral assignment of a vendor’s interest in a contract for deed was a transfer of an interest in real property).

43. *E.g.*, *id.*

44. See discussion *infra* accompanying notes 149-155.

45. Redle, *supra* note 29, at 187.

46. *Id.* at 187-91.

47. *Id.* at 191.

48. *E.g.*, *Frearson v. Wingold (In re Equitable Dev. Corp.)*, 617 F.2d 1152 (5th Cir. 1980); *Borock v. NBD Dearborn Bank (In re D.J. Maltese, Inc.)*, 42 B.R. 589 (Bankr. E.D. Mich. 1984).

49. *Southwest Nat’l Bank v. Southworth (In re Southworth)*, 22 B.R. 376, 378 (Bankr. D. Kan. 1982).

50. JAMES J. WHITE & ROBERT S. SUMMERS, UNIFORM COMMERCIAL CODE § 21-7 (3d Student ed. 1988); accord JULIAN B. McDONNELL, 1C SECURED TRANSACTIONS UNDER THE UNIFORM COMMERCIAL CODE, SECURITY INTERESTS IN REAL ESTATE RELATED OBLIGATIONS § 16C.05(3)(c) (1992).

Other jurisdictions employ section 9-102(3) and Official Comment 4 of section 9-102 so that transactions that use real estate contacts as collateral are included under the Code despite the exclusion of section 9-104(j).⁵¹ Under section 9-102(3), even though the underlying security for the obligation to pay the debt is subject to real property laws, the security interest is still covered by the Code.⁵² An illustration of this approach is when a mortgagee pledges a mortgage and note as security for a subsequent transaction (*i.e.*, realty paper). Article 9 is applicable to the realty paper even though a real estate mortgage secures the note.⁵³

When confronted with issues similar to those in *In re Anthony*, the United States District Court for the District of New Mexico and the United States Bankruptcy Court for the District of New Mexico have applied the substantive law of New Mexico.⁵⁴ Both courts have acknowledged and have given effect to New Mexico law, which considers a vendor's interest in a real estate contract as personalty,⁵⁵ and have concluded, as a result of the personalty theory, that an assignment of a vendor's interest falls within the province of Article 9 of the Code.⁵⁶

The issue before the United States District Court for the District of New Mexico was whether "an assignment of an interest in a real estate contract must be filed in the Office of the New Mexico Secretary of State [(under the Code)] in order to perfect an interest in that assignment."⁵⁷ In its decision, the district court considered section 55-9-102 and section 55-9-104(j) of the New Mexico statutes.⁵⁸ The district court recognized that under New Mexico law a vendor's interest in a real estate contract is personalty⁵⁹ and concluded that an assignment of such an interest was subject to the filing provisions of Article 9 to perfect the security interest.⁶⁰

In a fact pattern similar to *In re Anthony*, the United States Bankruptcy Court for the District of New Mexico held the assignment of real estate

51. *E.g.*, *In re Equitable Dev. Corp.*, 617 F.2d 1152 (5th Cir. 1980) (relying on the Official Comment to section 9-104 of the Code, which states that the exclusions only serve to reiterate what has been expressed in section 9-102(3)); *Erickson v. Seattle Trust & Sav. Bank (In re Freeborn)* 617 P.2d 424, 428 (Wash. 1980).

52. N.M. STAT. ANN. § 55-9-102(3) (Repl. Pamp. 1987); *e.g.*, *In re Equitable Dev. Corp.*, 617 F.2d 1152 (5th Cir. 1980) (Article 9 is applicable to a collateral assignment of a vendor's right to receive payments from a real estate contract despite the fact that a mortgage was also given as collateral).

53. N.M. STAT. ANN. § 55-9-102 (Official Cmt. 4); *see also* *Northern Acres, Inc. v. Hillman State Bank (In re Northern Acres, Inc.)*, 52 B.R. 641 (Bankr. E.D. Mich. 1985) (distinguishing between a security interest in realty and a security instrument secured by realty).

54. *See* *Campbell v. First Interstate Bank of Albuquerque*, Civ. No. 88-349JC (D. N.M. Aug. 3, 1989); *Simpson v. First Nat'l Bank in Clayton (In re Simpson)*, 56 B.R. 586 (Bankr. D. N.M. 1986).

55. *Id.*

56. *Id.*

57. *Campbell v. First Interstate Bank of Albuquerque*, Civ. No. 88-349JC, (D. N.M. Aug. 3, 1989).

58. *Id.*

59. *Id.*

60. *Id.*

contracts to be "general intangibles"⁶¹ and subject to the filing provisions of the Code.⁶² The debtor, Simpson, assigned his vendor's interest in five real estate contracts to the First National Bank of Clayton as collateral for a loan. The bankruptcy court appears to have held that because First National had not filed pursuant to Article 9, its security interest in the real estate contracts was not perfected and was therefore void.⁶³ The precedential value of the case is weakened, however, because the assignments were never filed under the real property laws or under the Code.⁶⁴

B. Prior New Mexico Case Law

The nature of a vendor's interest in a real estate contract has been well-defined in New Mexico: it is "personal property and not real [property]."⁶⁵ The result has been accepted and explained through the doctrine of equitable conversion.⁶⁶

The doctrine of equitable conversion converts the vendor's real property interest to a personal property interest.⁶⁷ The vendor retains a legal interest in the real property, whereas the vendee retains an equitable interest in the real property.⁶⁸ The vendee is considered the "owner" of the real property.⁶⁹ The only real property concept associated with the vendor's interest in a real estate contract is that the vendor holds "bare" legal title as trustee of the real property.⁷⁰ In other words, the vendor holds legal title merely as a security interest for the balance of payments.⁷¹ Thus, it is the vendee, not the vendor, who holds a substantive interest in the real property.

There are several cases that support these propositions of law.⁷² In *Vihstadt v. New Mexico Real Estate Commission*,⁷³ a real estate broker was accused of certain acts of impropriety giving rise to the sale of a real estate contract.⁷⁴ As a result, the Real Estate Commission attempted

61. A general intangible under the Code is "any personal property . . . other than goods, accounts, chattel paper, documents, instruments and money." N.M. STAT. ANN. § 55-9-106 (Repl. Pamp. 1987).

62. See *In re Simpson*, 56 B.R. 586, 588 (Bankr. D. N.M. 1986).

63. *Id.* at 586-87.

64. *Id.* at 587.

65. *Marks v. City of Tucumcari*, 93 N.M. 4, 7, 595 P.2d 1199, 1202 (1979).

66. See *Cannefax v. Clement*, 786 P.2d 1377, 1386-87 (Utah Ct. App. 1990), for a historical development of the doctrine of equitable conversion.

67. *Marks*, 93 N.M. at 7, 595 P.2d at 1202.

68. *Id.*

69. *Id.* at 5, 595 P.2d at 1200.

70. *Mesich v. Board of County Comm'rs*, 46 N.M. 412, 417, 129 P.2d 974, 979 (1942).

71. *Id.*

72. See *Vihstadt v. New Mexico Real Estate Comm'n*, 106 N.M. 641, 748 P.2d 14 (1988); *Marks v. City of Tucumcari*, 93 N.M. 4, 595 P.2d 1199 (1979); *First Nat'l Bank of Belen v. Luce*, 87 N.M. 94, 529 P.2d 760 (1974); *Gregg v. Gardner*, 73 N.M. 347, 388 P.2d 68 (1963); *Mesich v. Board of County Comm'rs of McKinley County*, 46 N.M. 412, 129 P.2d 974 (1942); *Garcia v. New Mexico Real Estate Comm'n*, 108 N.M. 591, 775 P.2d 1308 (Ct. App.), *cert. denied*, 108 N.M. 624, 776 P.2d 846 (1989).

73. 106 N.M. 641, 748 P.2d 14 (1988).

74. *Id.* at 642, 748 P.2d at 15.

to revoke his license. The New Mexico Supreme Court held that the Commission lacked authority to revoke the broker's license because the sale of a real estate contract is not a real estate transaction.⁷⁵ The real estate contract is an item of personalty.⁷⁶

In *Marks v. City of Tucumcari*,⁷⁷ the New Mexico Supreme Court applied principles adopted in *Mesich v. Board of County Commissioners* and *Gregg v. Gardner*.⁷⁸ The vendee (Marks) purchased real property from the vendors (the Goldsteins) under a real estate contract.⁷⁹ Subsequently, the City of Tucumcari obtained a judgment lien against the vendors. The City attempted to seize the real property held by the vendee by virtue of the *vendor's* interest in the real property. The supreme court affirmed that the vendor holds legal title as trustee for the vendee and that, through the doctrine of equitable conversion, the vendor's interest is personalty.⁸⁰ The supreme court held that because a vendor's interest in a real estate contract is personalty and not realty, judgment liens cannot be executed on the real property through a vendor's interest.⁸¹

In *Garcia v. New Mexico Real Estate Commission*,⁸² real estate investors attempted to recover damages under the Real Estate Recovery Act because they were not able to satisfy previous judgments against a licensed real estate broker for alleged fraudulent transactions.⁸³ Consistent with *Vihstadt*, the New Mexico Court of Appeals held that because a vendor's interest in a real estate contract is personalty, the sale of a real estate contract is not a real estate transaction, and that a salesperson's or a real estate broker's license is not required to broker interests in real estate contracts.⁸⁴

In *First National Bank of Belen v. Luce*,⁸⁵ the New Mexico Supreme Court had already indicated how the Code would apply when a real estate contract is used as collateral for a loan. In 1963, W. R. Tucker, Jr., a vendor of real property, entered into an executory real estate contract with Foster Newton. The real estate contract was not recorded. Mr. Newton then assigned his vendee's interest in the real estate contract to the Levacys, who took possession of the land. The assignment was not recorded. Mr. Tucker, the original vendor, entered into a mortgage on the land with the First National Bank of Belen. Mr. Tucker then assigned his vendor's interest in the real estate contract (which the supreme

75. *Id.* at 643-44, 748 P.2d at 16-17.

76. *Id.* at 644, 748 P.2d at 17.

77. 93 N.M. 4, 595 P.2d 1199 (1979).

78. *Id.* at 5-6, 595 P.2d at 1200-01; see *Mesich v. Board of County Comm'rs*, 46 N.M. 412, 129 P.2d 974 (1942); *Gregg v. Gardner*, 73 N.M. 347, 388 P.2d 68 (1963).

79. *Marks*, 93 N.M. at 5, 595 P.2d at 1200.

80. *Id.* (affirming *Gregg v. Gardner*, 73 N.M. 347, 388 P.2d 68 (1963), and *Mesich v. Board of County Comm'rs*, 46 N.M. 412, 129 P.2d 974 (1942)).

81. *Id.* at 7, 595 P.2d at 1202.

82. 108 N.M. 591, 775 P.2d 1308 (Ct. App.), *cert. denied*, 108 N.M. 624, 776 P.2d 846 (1989).

83. *Id.* at 592, 775 P.2d at 1309.

84. *Id.* at 595-97, 775 P.2d at 1312-14. After *Garcia*, investors in real estate contracts acquired through real estate brokers cannot recover losses from the Real Estate Recovery Fund.

85. 87 N.M. 94, 529 P.2d 760 (1974).

court determined to be a possibility of reverter) and the real estate contract to his former wife, Mrs. Whynama Tucker Luce. Subsequently, Mr. Tucker passed away. The bank attempted to foreclose on the mortgage that was created with Mr. Tucker.⁸⁶

In this same case, the supreme court stated that "because the bank failed to comply with the provisions of the Uniform Commercial Code on secured transactions, including the filing provisions,"⁸⁷ it could not foreclose on the mortgage.⁸⁸ The bank had failed to perfect the security interest that it had taken in the vendor's interest in the real estate contract which is considered personalty in New Mexico.⁸⁹ Furthermore, the supreme court held that the mortgage did not attach to the real property.⁹⁰

The supreme court provided the failure-to-file rationale in dicta or an alternative holding, as *Luce* was argued on other grounds.⁹¹ The *Luce* decision was based on the bank's negligence in failing to determine the interests of all parties.⁹² Such an inquiry would have disclosed facts affecting the title of the property.⁹³ Therefore, it was determined that the bank had actual notice of the Levacy's possessory interest in the real estate.⁹⁴ The decision was also based on the nature of the lien on the vendor's interest.⁹⁵ The vendor's interest was a possibility of reverter.⁹⁶ The bank only had a lien on the vendor's interest in the event that the Levacys defaulted on the balance of payments under the real estate contract, and no lien on the balance of payments due.⁹⁷ Therefore, the bank could not pursue a foreclosure.⁹⁸

IV. RATIONALE OF THE *ANTHONY* COURT

The *Anthony* court provided three primary components for its decision: (1) the effect of the Anthonys' legal title to the real property; (2) Official Comment 4 to section 9-102; and (3) the practical place parties would be expected to search the title history of real property.

A. *Effect of Legal Title*

The *Anthony* court recognized that a vendor of real estate retains "bare" legal title until the purchase price has been satisfied.⁹⁹ Because the Anthonys retained legal title to the real property until full payment

86. *Id.* at 94-95, 529 P.2d at 760-61.

87. *Id.* at 96, 529 P.2d at 762.

88. *Id.*

89. *Id.*

90. *Id.*

91. *Id.*

92. *Id.* at 95, 529 P.2d at 761.

93. *Id.*

94. *Id.*

95. *Id.*

96. *Id.*

97. *Id.*

98. *Id.*

99. *In re Anthony*, 114 N.M. at 98, 835 P.2d at 814.

was received from the vendees, however, the *Anthony* court held that the transaction involved a "transfer of an interest in or lien on real estate."¹⁰⁰

It is noted that the only way in which a vendor's interest reverts to a legal interest from an equitable interest is if the vendee defaults on the payments causing the real property to revert back to the vendor. Although, through the doctrine of equitable conversion, the vendee holds equitable title to the real property, the vendee, for all practical purposes, holds legal title.¹⁰¹ Under the Code and New Mexico case law,¹⁰² the title is viewed as a security interest for payment of the purchase price.

As stated in *Marks*,¹⁰³ a vendor's interest in a real estate contract is not an interest in realty.¹⁰⁴ In light of *Marks*, there can be no solid base for the *Anthony* court to stand upon and conclude that a realty interest was transferred to the Alsups.

B. Effect of Section 9-102 and Official Comment 4

The trustee argued that the *Anthony*-Alsups transaction and the transaction described in Official Comment 4 were compatible.¹⁰⁵ The trustee acknowledged that while the *Anthony*-Sanchez real estate transaction was not subject to the Code, its subsequent assignment was subject to the Code, as was the collateral use of the note in the transaction described in Official Comment 4. The *Anthony* court construed the language of section 9-102 and Official Comment 4 in a three-part analysis to reject the trustee's argument. In the first part of its analysis, the *Anthony* court noted the amendments to Official Comment 4 from one version of the Code to the next. In the second part of its analysis, the *Anthony* court relied upon a law review article that assigns tiers to different transactions. In the third part of its analysis, the *Anthony* court deferred to real property laws to provide notice of a party's security interest.

1. Amended Official Comment 4

The *Anthony* court reviewed amended Official Comment 4 to conclude in part that an analogy could not be made between the *Anthony*-Alsups transaction and the transaction described in Official Comment 4. In

100. *Id.*

101. See 8 RONALD A. ANDERSON, UNIFORM COMMERCIAL CODE § 9-102:13, at 457, & § 9-102:20, at 461 (3d ed. 1985).

102. See *Mesich v. Board of County Comm'rs*, 46 N.M. 412, 417, 129 P.2d 974, 979 (1942).

103. *Marks v. City of Tucumcari*, 93 N.M. 4, 595 P.2d 1199 (1979).

104. *Id.* at 7, 595 P.2d at 1202.

105. Official Comment 4 to section 9-102 provides:

The owner of Blackacre borrows \$10,000 from his neighbor, and secures his note by a mortgage on Blackacre. This article is not applicable to the creation of the real estate mortgage. Nor is it applicable to the sale of the note by the mortgagee, even though the mortgage continues to secure the note. However, when the mortgagee pledges the note to secure his own obligation to X, this article applies to the security interest thus created, which is a security interest in an instrument even though the instrument is secured by a real estate mortgage.

N.M. STAT. ANN. § 55-9-102 (Repl. Pamp. 1987).

deciding that section 9-102(3) did not mean that a subsequent assignment of a vendor's interest in a real estate contract as collateral for a loan was subject to Article 9, the court stated that Official Comment 4 of section 9-102 demonstrates that Article 9 was not intended to extend to mortgages or similar real estate transactions, including real estate contracts.¹⁰⁶

The court noted that from the original version of Official Comment 4 as adopted in 1962, to the amended version in 1966, the drafters "deleted the words 'and mortgage,' and [also] substituted the words 'instrument' [in place of] the words 'note and mortgage.'"¹⁰⁷ Because of the deletion of the words "and mortgage," the *Anthony* court suggested that the Code was not meant to govern security interests in mortgages and real estate contracts.¹⁰⁸

The drafting history of section 9-104 casts doubt on the court's conclusion. When section 9-102(3) was added to the Code, it was the intent of the framers of the Code to emphasize the fact that a "note" falls within the province of Article 9 of the Code regardless of the underlying security.¹⁰⁹ Article 9 was meant to apply to a "note" even though it may be secured by a real estate mortgage.¹¹⁰

2. First v. Second Tier Transactions

The *Anthony* court relied on a law review article written by Robert H. Bowmar to conclude in part that an analogy could not be made between the Anthony-Alsup transaction and the transaction described in Official Comment 4.¹¹¹ The *Anthony* court identified the Anthony-Alsup transaction as a "first-tier" transaction and the transaction described in Official Comment 4 as a "second-tier" transaction. A first-tier transaction was identified as one in which a real estate vendor assigns his real estate contract to a creditor as security for the vendor's note.¹¹² A second-tier transaction was identified as one in which the same creditor assigns the vendor's note, plus the assignment, as security for the creditor's own note to a second creditor.¹¹³

106. *In re Anthony*, 114 N.M. at 98, 835 P.2d at 814.

107. *Id.*

108. Perhaps another reason for deletion of the words "and mortgage" from Official Comment 4 is that a mortgage is worthless without a promissory note; it is the promissory note that obliges the debtor to pay his debt, and not the mortgage. See REDLE, *supra* note 29, at 190. Therefore, it may be that the drafters' intent was to emphasize the distinction in a note and a mortgage and to provide the corresponding weight.

109. THE AMERICAN LAW INSTITUTE AND THE NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS, 1956 RECOMMENDATIONS OF THE EDITORIAL BOARD FOR THE UNIFORM COMMERCIAL CODE, ARTICLE 9 253-55 (1956).

110. *Id.*; see also N.M. STAT. ANN. § 55-9-102 (Repl. Pamp. 1987) (Official Cmt. 4) (Article 9 applies to the security interest created when a mortgagee pledges a note as security).

111. See *In re Anthony*, 114 N.M. at 98, 835 P.2d at 815; see Robert H. Bowmar, *Real Estate Interests as Security Under the UCC: The Scope of Article Nine*, 12 UCC L.J. 99, 137-45 (1979).

112. *In re Anthony*, 114 N.M. at 98, 835 P.2d at 815.

113. *Id.*

It seems, however, that the Bowmar article was not examined in its entirety. Looking beyond the preamble of the Bowmar article, the author demonstrates that the distinction between a first and second-tier transaction is transparent.¹¹⁴ Regardless of whether the Anthony-Alsup transaction is classified as a first or second-tier transaction, the same result is reached under the Bowmar analysis—the Anthony-Alsup transaction was within the scope of Article 9 of the Code.

The Bowmar article teaches that the threshold question in a first-tier transaction is whether the assignment was absolute or intended as a transfer for security purposes.¹¹⁵ The bankruptcy court of *In re Anthony* had addressed this question and decided that the Assignment was not absolute.¹¹⁶ The bankruptcy court reasoned that if the Assignment were absolute, the Alsups, upon default by the vendee in the Anthony-Sanchez contract, could pursue their remedy under the Anthony-Sanchez contract but could not demand satisfaction from the Anthonys.¹¹⁷ This was not the case. The Assignment was to become absolute only if the Anthonys defaulted on their payments for the Alsup loan.¹¹⁸ Furthermore, the Assignment included a provision for substitute collateral from the Anthonys in the event of the vendees' default,¹¹⁹ further indicating that the Assignment was not absolute.

Because the Assignment was not absolute, the first-tier transaction would be subject to Article 9 if it is one of the defined classes of collateral, such as a "general intangible,"¹²⁰ under Article 9.¹²¹ It is probable that the Anthony-Alsup transaction was within the Article's defined classes of collateral because a vendor's interest in a real estate contract is personalty.

3. Deference to Real Property Laws

The *Anthony* court found support in the language of Official Comment 4 to defer notice of the Assignment to real property laws. Official Comment 4 was quoted as follows: "[Article 9] leaves to *other law* the question of the effect on rights under the mortgage of delivery or nondelivery of the mortgage or of recording or nonrecording of assignment of the mortgagee's interest."¹²² The court reasoned that there exists a well-developed body of real estate law that was intended to govern transactions involving real property such as the Anthony-Alsup trans-

114. See Bowmar, *supra* note 111, at 137-45.

115. *Id.* at 137; see also BAXTER DUNAWAY, THE LAW OF DISTRESSED REAL ESTATE, pt. D (Foreclosure and Other Terminations of Mortgages), § 10.09(2) (Assignment/Sale of Vendor's Interest), & § 19.11 (Outright Assignment/Sale) (1990).

116. Slip Opinion at 6, *In re Anthony*, (No. 7-89-00194MA).

117. *Id.*

118. *Id.* at 2.

119. *Id.*

120. See N.M. STAT. ANN. § 55-9-106 (Repl. Pamp. 1987) and *supra* note 61.

121. See Bowmar, *supra* note 111, at 137-38.

122. *In re Anthony*, 114 N.M. at 98, 835 P.2d at 815 (emphasis in original).

action. Accordingly, the Anthony-Alsup transaction was deferred to real property laws for delivery and recording.

C. *Practical Matter to Search Real Property Records*

The main purpose of both the Article 9 filing provisions and the real estate recording statutes is to provide notice of interests in property.¹²³ The *Anthony* court reasoned that, as a practical matter, title searchers would more likely search the county records where the real property is located and not the Secretary of State's files.¹²⁴ This practical approach has merit, but the conclusion seems questionable without evidence of how title searchers in fact operate. It is at least as likely that a title searcher, creditor, or any other "searcher" would search the files of the Secretary of State considering that existing New Mexico case law characterizes a vendor's interest in a real estate contract as personalty. This is especially true after *First National Bank of Belen v. Luce*, which suggested that a collateral assignment of a vendor's interest in a real estate contract had to be perfected according to the Code's filing provisions.¹²⁵

V. ANALYSIS AND IMPLICATIONS

The *Anthony* court sustained a broad interpretation of section 9-104(j) with little regard for the purpose of the Anthony-Alsup transaction, whether it was to create a security interest or otherwise, merely because the transaction touched on real property.¹²⁶ The *Anthony* court was concerned with "giv[ing] effect . . . to the language and intent of the legislature, considering the language of the [Code] as a whole."¹²⁷ Effectively, by interpreting section 9-104(j) broadly, the *Anthony* court narrowed the scope of Article 9 of the Code, an approach that is not widely-shared by other jurisdictions.¹²⁸

To give full effect to the Code, "[t]he exclusions made [under section 9-104(j) of the Code] are [to be] *narrowly* construed so as to give Article 9 [its] widest application."¹²⁹ The Code, in its entirety,¹³⁰ was meant to be "liberally construed and applied to promote its underlying purposes and policies."¹³¹ The underlying purpose of the Code is to facilitate the

123. See N.M. STAT. ANN. § 55-9-302 (Repl. Pamp. 1987); N.M. STAT. ANN. §§ 14-9-1 to -9 (Repl. Pamp. 1988 & Supp. 1992).

124. *Id.*

125. See *Luce*, 87 N.M. at 94-96, 529 P.2d at 760-62.

126. See *In re Anthony*, 114 N.M. at 97, 835 P.2d at 813.

127. *Id.* at 100, 835 P.2d at 815.

128. See *Landmark Land Co. v. Sprague*, 529 F. Supp. 971, 976-77 (S.D.N.Y. 1981) (criticizing the rationale of *In re Bristol Assoc., Inc.*, 505 F.2d 1056, 1060 (3d Cir. 1974), which adopted a broad interpretation of the exclusions of section 9-104(j)), *rev'd*, 701 F.2d 1065 (2d Cir. 1983).

129. 8 RONALD A. ANDERSON, UNIFORM COMMERCIAL CODE § 9-104:4, at 532 (3d ed. 1985) (emphasis added).

130. See *Hunick v. Orona*, 99 N.M. 306, 307, 657 P.2d 633, 634 (1983) (the Code was intended to be read as a whole and individual sections do not stand on their own).

131. N.M. STAT. ANN. § 55-1-102(1) (Repl. Pamp. 1987).

law of commercial transactions, to define and refine commercial transactions, and to provide a uniform approach to commercial transactions.¹³²

The drafters of the Code had already anticipated the issue presented in *In re Anthony*.¹³³ They realized that there would be some overlap between real and personal property transactions that would have to be reconciled.¹³⁴ In the event of an overlap, "it bec[omes] necessary to characterize the property at issue as real[ty] or personal[ty]."¹³⁵ Article 9 is applicable if the property is characterized as personalty, but Article 9 is not applicable if the property is characterized as realty.¹³⁶

The language of section 9-102 of the Code makes it necessary to characterize the nature of the transaction as one involving realty or personalty in order to determine whether Article 9 is applicable.¹³⁷ The *Anthony* court, however, made no attempt to characterize the collateral used in the Anthony-Alsup transaction. Rather, the *Anthony* court reasoned that because it had sustained a broad interpretation of section 9-104(j), the characterization of the collateral was irrelevant.¹³⁸ While it is true that once a broad interpretation of the exclusions is adopted it is not necessary to characterize the collateral, the analysis of section 9-102 should proceed. By omitting this analysis, the court cast doubt upon existing New Mexico case law.

For instance, the *Anthony* court recognized that "under New Mexico law, a vendor's interest in a real estate contract is personalty, and not real[ty]."¹³⁹ Although neither party disputed this proposition of law,¹⁴⁰ the *Anthony* court dismissed the distinction in one fatal blow without providing any reasons. The Alsup's argued before the court that the Assignment was also an interest in realty and thereby excluded under section 9-104(j).¹⁴¹ The *Anthony* court adopted the Alsup's argument and the reasoning of *In re Hoepfner*¹⁴² to proclaim that "[t]oo much emphasis has been placed upon the fact that a land contract vendor's interest is personal[ty]."¹⁴³ No further mention was made of the realty-personalty distinction with regard to New Mexico case law.

To determine whether Article 9 applies to a transaction, the primary test is whether the transaction was intended to provide a security interest

132. *Id.* § 55-1-102(2).

133. See WILLIAM D. HAWKLAND ET AL., 8 UNIFORM COMMERCIAL CODE SERIES, ARTICLE 9: SECURED TRANSACTIONS § 9-104:11, at 222 (Cum. Supp. 1992).

134. *Id.*

135. *Id.*; accord ANDERSON, *supra* note 129, § 9-102:22, at 463.

136. HAWKLAND ET AL., *supra* note 133, § 9-104:11, at 222-23.

137. See ANDERSON, *supra* note 129, § 9-102:22, at 463.

138. *In re Anthony*, 114 N.M. at 97, 835 P.2d at 813.

139. *Id.* at 96, 835 P.2d at 812 (citing *Marks v. City of Tucumcari*, 93 N.M. 4, 595 P.2d 1199 (1979)).

140. *Id.*

141. *Id.* Section 9-104 does not apply "to the creation or transfer of an interest in or lien on real estate . . ." N.M. STAT. ANN. § 55-9-104(j) (Cum. Supp. 1992).

142. 49 B.R. 124, 127-129 (Bankr. E.D. Wis. 1985).

143. *In re Anthony*, 114 N.M. at 97-98, 835 P.2d at 813-14 (quoting *In re Hoepfner*, 49 B.R. 124, 127 (Bankr. E.D. Wis. 1985)).

as defined in section 1-201(37) of the Code.¹⁴⁴ What was the intent of the parties to the Anthony-Alsup transaction? This question is fundamental. It is evident from the Anthony-Alsup assignment that the parties intended to secure the \$10,000 debt with the Assignment of the Anthonys' vendors' interest in the real estate contract. The Assignment plainly stated that "[t]his assignment is [for] security."¹⁴⁵ The Anthonys used their vendor's interest in the Anthony-Sanchez real estate contract as collateral in the Anthony-Alsup transaction.¹⁴⁶

The Anthonys' interest in the Anthony-Sanchez contract was a vendor's interest in a real estate contract, and it was not realty under New Mexico law.¹⁴⁷ Therefore, given the *Marks* proposition of law,¹⁴⁸ it is difficult, if not impossible, to conclude that there existed a "transfer of an interest in or a lien on real property" in the Anthony-Alsup secured transaction.

The *Anthony* opinion does not consider the possibility that the assignment of a vendor's interest in a real estate contract involves a "general intangible." It is defined by what it is not. A general intangible is personal property that is *not* "goods, accounts, chattel paper, documents, instruments [or] money."¹⁴⁹ The use of a vendor's interest in a real estate contract as collateral is considered a general intangible in some jurisdictions, including New Mexico bankruptcy courts.¹⁵⁰

A. Implications

The decision of *In re Anthony* is difficult to reconcile with several New Mexico cases already discussed.¹⁵¹ In answering the certified question, the *Anthony* court raised more questions than it answered. The holdings of *Luce*, *Vihstadt*, *Marks*, *Garcia*, *Gregg*, and *Mesich* apparently are overruled to the extent they are inconsistent with *In re Anthony*.

After *In re Anthony*, the transfer of a vendor's interest in a real estate contract is considered a transfer of an interest in realty for recording purposes. Whether this principle will be extended for other purposes remains to be determined. Until then, the application of several principles

144. N.M. STAT. ANN. § 55-9-102 (Repl. Pamp. 1987) (Official Cmt.).

145. Reardon v. Alsup (*In re Anthony*), Ch. 7 Case No. 7-89-00194MA, Adv. No. 89-0066M, slip op. at 2 (Bankr. D. N.M. Aug. 31, 1989).

146. *In re Anthony*, 114 N.M. at 96, 835 P.2d at 812.

147. *Id.*; see *Marks v. City of Tucumcari*, 93 N.M. 4, 595 P.2d 1199 (1979) (a vendor's interest in an executory real estate contract is not subject to judgment liens because the vendor's interest is personal property and not real property).

148. See *Marks*, 93 N.M. at 6-7, 595 P.2d at 1201-02.

149. N.M. STAT. ANN. § 55-9-106 (Repl. Pamp. 1987).

150. See *In re Simpson*, 56 B.R. 586 (Bankr. D. N.M. 1986); *Crichton v. Himlie Properties*, 713 P.2d 108 (Wash. 1986); *Mercantile Bank Nat'l Assoc. v. Brown* (*In re Holiday Intervals, Inc.*), 931 F.2d 500 (8th Cir. 1991); see also *Castle Rock Indus. Bank v. S.O.A.W. Enters., Inc.* (*In re S.O.A.W. Enters., Inc.*), 32 B.R. 279 (Bankr. W.D. Tex. 1983) (contracts for deed when used to secure loans were general intangibles); BARKLEY CLARK, *THE LAW OF SECURED TRANSACTIONS UNDER THE UNIFORM COMMERCIAL CODE* § 1.08[10][a], at 1-113 (2d ed. 1988); *Bowmar*, *supra* note 111, at 143.

151. See, e.g., *Marks v. City of Tucumcari*, 93 N.M. 4, 595 P.2d 1199 (1979); *First Nat'l Bank of Belen v. Luce*, 87 N.M. 94, 529 P.2d 760 (1974); *Garcia v. New Mexico Real Estate Comm'n*, 108 N.M. 591, 775 P.2d 1308 (Ct. App. 1989).

of New Mexico law becomes unpredictable. For instance, are real estate licenses now required by real estate brokers to broker interests in real estate contracts? Did *In re Anthony* overrule *Garcia*? Can a judgment lien now attach to a vendor's interest in a real estate contract, thus overruling *Marks*? Has stare decisis reached a certain level of instability in New Mexico?¹⁵² Whether these questions, or others, are answered definitively was not addressed by the *In re Anthony* decision. The *Anthony* court was silent on these important questions.

VI. CONCLUSION

Perhaps the *Anthony* court's decision is sound in that it encourages recording (filing) in accordance with the purpose of providing notice of title encumbrances. On the other hand, *In re Anthony* is difficult to reconcile with existing New Mexico case law. By its decision, the court may have overturned principles upon which practitioners, commercial entities, and the general business world rely.

Previously, secured parties could operate under the assurance that this type of transaction (involving a vendor's interest in a real estate contract) was personalty.¹⁵³ By disrupting prior holdings with *In re Anthony*, New Mexico law may regress to a pre-Code era when there were many security devices which required filing in different places.¹⁵⁴ If so, the *In re Anthony* decision places New Mexico law in the very state of confusion that the Code was designed to ameliorate. Such an unintended result undermines the essence of the Code which was to effectuate a "uniform" approach to commercial transactions.

In future cases dealing with similar issues, perhaps *In re Anthony* will be viewed as sui generis. Its holding, however, is broad and represents the official response of the New Mexico Supreme Court on the certified question. Prior to the *In re Anthony* decision, secured parties to a

152. See generally *Baca v. Chavez*, 32 N.M. 210, 252 P. 987 (1927) (discussion of the stare decisis doctrine as related to property in New Mexico). The precedent of case law must be respected; there is no other junction to follow. *Id.* The "mere unsoundness" of decisions is not enough reason to constitute an overruling. *Id.* at 215, 252 P. at 990. In reviewing prior decisions, the courts must recognize that property title transactions have been governed by those prior decisions, that the outcome of litigation involving property rights has been determined by those prior decisions, and that a change in existing law may "cast doubt upon many titles" created as a result of those prior decisions. *Id.* Case law must be followed as precedent even if the decisions seem irrational. *Id.*

153. See, e.g., *Vihstadt v. New Mexico Real Estate Comm'n*, 106 N.M. 641, 748 P.2d 14 (1988) (Real Estate Commission lacks jurisdiction over broker because sale of a real estate contract is sale of personal property and not a real estate transaction); *Marks v. City of Tucumcari*, 93 N.M. 4, 595 P.2d 1199 (1979) (vendor's interest in an executory real estate contract is not subject to judgment liens because it is personalty and not realty); *Gregg v. Gardner*, 73 N.M. 347, 388 P.2d 68 (1963) (vendor's interest in a real estate contract becomes personalty through the doctrine of equitable conversion); *Mesich v. Board of County Comm'rs*, 46 N.M. 412, 129 P.2d 974 (1942) (vendor of a real estate contract holds bare legal title to real property as a security interest only); *Garcia v. New Mexico Real Estate Comm'n*, 108 N.M. 591, 775 P.2d 1308 (Ct. App. 1989) (real estate broker's license is not required to sell real estate contracts because they are personal property and not real estate transactions).

154. See N.M. STAT. ANN. § 55-9-101 (Repl. Pamph. 1987) (Official Comment discusses various pre-Code security devices and associated problems).

transaction involving real-personal property would have been wise to file under *both* the real property laws *and* the filing provisions of the Code.¹⁵⁵ *In re Anthony* dictates that to perfect an assignment of a vendor's interest in a real estate contract, it only has to be recorded in accordance with real property laws. Nonetheless, secured parties may be inclined to file notice of a security interest in every possible place, including with the Secretary of State, to ensure protection against third parties.

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155. See John F. Wagner, Jr., Annotation, *Applicability of Article 9 of Uniform Commercial Code to Assignment of Rights Under Real-Estate Sales Contract, Lease Agreement, or Mortgage as Collateral for Separate Transaction*, 76 A.L.R. 4TH 765, 770 (1990 & Supp. 1992).